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MEASURING PEARSON IN THE CIRCUITS

Ted Sampsell-Jones* & Jenna Yauch**

INTRODUCTION

Qualified immunity analysis is divided into two prongs: a merits prong, which considers whether a constitutional right was violated, and an immunity prong, which considers whether the officer's conduct was entitled to qualified immunity.¹ Even if an officer's conduct violates a constitutional right, qualified immunity protects him from civil liability if the right was not so clearly established that it would have been clear to a reasonable officer that his conduct was unlawful.²

In 2001, in *Saucier v. Katz*,³ a unanimous U.S. Supreme Court required that these two prongs be analyzed in the "proper" order.⁴ Courts first had to determine whether the plaintiff alleged a violation of a constitutional right, and then decide whether that right was clearly established.⁵ This sequential determination was intended to further the development of the law—or rather, to prevent courts from depriving the law of explication of constitutional rights.⁶ The *Saucier* approach to qualified immunity largely reflected the approach advocated by our co-panelist Dean John Jeffries in his seminal article *The Right-Remedy Gap in Constitutional Law*.⁷

Eight years later in *Pearson v. Callahan*,⁸ however, the Court retreated from *Saucier*.⁹ Another unanimous court held that the *Saucier* order was no longer mandatory.¹⁰ The Court's retreat was a response to lower courts' difficulty applying the mandatory *Saucier* framework.¹¹ It was also a response to a growing body of criticism of *Saucier*, perhaps none more influential than that of our co-panelist, Judge Pierre Leval.¹² Heeding that

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1. See *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

2. See *id.* at 231 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *id.* at 232 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

3. 533 U.S. 194.

4. *Id.* at 200.

5. *Id.* at 200, 202.

6. *Id.* at 201.

7. 109 YALE L.J. 87 (1999).

8. 555 U.S. 223 (2009).

9. *Id.* at 236.

10. *Id.*

11. *Id.* at 234–35.

12. *Id.* (citing Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275, 1277 (2006)).

criticism, *Pearson* made the two-step framework optional. The *Pearson* Court instructed that lower courts “exercise their sound discretion” in determining which of the *Saucier* prongs to address first and the necessity of analyzing both prongs instead of the determinative one alone.¹³

Functionally, *Pearson* gave courts four options for adjudicating qualified immunity cases. Under *Saucier*, qualified immunity cases could be resolved in only three ways:

- | | | |
|----------------|---|--------------------------|
| Type A: | Prong One: no constitutional violation, and | |
| | Prong Two: a fortiori, qualified immunity | → <i>Defendant wins.</i> |
| | | |
| Type B: | Prong One: constitutional violation, but | |
| | Prong Two: qualified immunity | → <i>Defendant wins.</i> |
| | | |
| Type C: | Prong One: constitutional violation, and | |
| | Prong Two: no qualified immunity | → <i>Plaintiff wins.</i> |

By rendering Prong One optional, *Pearson* created a fourth ruling:

- | | | |
|----------------|---|--------------------------|
| Type D: | Prong One: skipped with no holding, and | |
| | Prong Two: qualified immunity | → <i>Defendant wins.</i> |

The Type D alternative renders Type A and B rulings purely optional and discretionary. Under *Pearson*, courts issuing a Type A or B ruling could issue a Type D ruling instead. Type A and B rulings, however, involve “unnecessary” decisions on Prong One—whether the defendant’s conduct violated the law—because in all such cases, the result is the same. When a court issues a Type A, B, or D ruling, the defendant wins on Prong Two—whether the officer was entitled to qualified immunity. The difference has to do with future cases. Prong One rulings may set broad precedent for future cases, while Prong Two rulings do not (or at least they have much narrower precedential effect). In other words, Type A and B rulings have prospective effect—“unnecessary” prospective effect—while Type D rulings do not. *Saucier* mandated prospective rulings; *Pearson* made them optional.

In this Essay, we seek to assess whether and why lower courts exercise that option. We seek to provide preliminary answers to two questions. First, to what extent are lower courts exercising their discretion to issue prospective rulings? In other words, to what extent are lower courts

13. *Id.* at 236.

choosing Type A or B rulings, and to what extent are they choosing Type D rulings? Second, what motivates courts to choose one type over another? In other words, why do courts issue Type A or B rulings when they could choose Type D, and vice versa?

To answer these questions, we examined every published circuit court case citing *Pearson* during the calendar years 2009 and 2010. The universe consisted of 190 cases. Our findings suggest that in most cases, lower courts continue to follow the sequenced *Saucier* framework and continue to issue Prong One rulings even when they are not necessary to the result. Our findings also suggest that lower courts generally choose from available options based on the same sort of pragmatic concerns identified in *Pearson*. On the whole, lower courts' application of *Pearson* has not been particularly political, nor has it been driven by theoretical worries about dicta and advisory opinions.

I. LOWER COURTS' DESCRIPTIONS OF *PEARSON*

Lower courts have described their new *Pearson*-derived discretion in varying terms. Some cases suggest that optional Prong One rulings are disfavored, while other cases suggest that they are favored. Put differently, some cases suggest that courts should generally issue Type D non-prospective rulings when possible, while others suggest that they should generally issue Type A or B prospective rulings.

The language of *Pearson* itself was almost studiously neutral—the Supreme Court's retreat from *Saucier* was cautious. The Court noted that it would still be beneficial to use the *Saucier* order in many cases, and reiterated that *Saucier*'s prescribed order would promote the development of precedent.¹⁴ Analyzing qualified immunity per *Saucier*'s sequence remained “especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.”¹⁵ The Court thus suggested that unnecessary Type A and B rulings would be valuable in many instances. On the other hand, the Court also noted that an optional framework was preferable for many reasons: it would conserve judicial resources, avoid decisions based on an underdeveloped record, and decrease the occurrence of decisions with no opportunity for appellate review.¹⁶ Therefore, the Court suggested that Type D rulings would be prudent in many instances.¹⁷

Pearson's even-handed treatment of *Saucier* left courts uncertain about how to characterize the relationship between the two cases. Courts even use varying labels to describe *Pearson*'s relation to *Saucier* in citations. Many courts parenthetically cite *Pearson* as overruling *Saucier* in part.¹⁸

14. *Id.*

15. *Id.*

16. *Id.* at 236–41.

17. *Id.*

18. See, e.g., *Lutchel v. Hagemann*, 623 F.3d 975, 979 (9th Cir. 2010); *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010); *Brooks v. City of Seattle*, 599 F.3d 1018, 1022 (9th Cir. 2010); *Heartland Acad. Cmty. Church v. Waddle*, 595 F.3d 798, 805 (8th Cir.

Others say it abrogated *Saucier*.¹⁹ The Ninth Circuit explained that *Pearson* “receded from” *Saucier*.²⁰

Their textual descriptions of the *Pearson-Saucier* relationship are equally diverse. Most contain more nuance than simply calling *Saucier* overruled. Some cases describe *Pearson* as relaxing *Saucier*’s requirements.²¹ Others portray the relationship as one of modification.²² Taking a more animated approach, the Tenth Circuit wrote that *Pearson* “jettisoned” *Saucier*’s holding that courts must rule on whether the alleged rights were violated before ruling on whether they were clearly established.²³ The same Circuit also described *Pearson* as “discard[ing]” *Saucier*’s “mechanical[]” approach.²⁴ In contrast, some courts have emphasized how much *Pearson* left unchanged. The Eleventh Circuit noted that *Pearson* “reaffirmed the long-established standard for qualified immunity” and only removed a requirement as to order.²⁵

A few cases suggested reading *Pearson* as giving a firm prescription for one type of ruling over another. In two separate opinions, for example, Tenth Circuit Judge Timothy Tymkovich declared he was “tak[ing] the advice of *Pearson*” and declining to analyze whether a complaint alleged a constitutional violation.²⁶ In each case, the district court had denied the defendants’ claims of qualified immunity.²⁷ Judge Tymkovich recognized that Courts of Appeals needed to address both prongs to affirm the ruling, but only one to reverse it.²⁸ Having decided at the outset to reverse the lower courts’ determination that the officer did not have immunity, Judge Tymkovich leaned on the “advice” of *Pearson* in focusing on Prong Two alone.

Following *Pearson*’s lead, however, most circuit court explanations of *Pearson*’s effect are neutral in tone.²⁹ One representative court explained that *Pearson* allows courts to “bypass the initial step” in the qualified immunity analysis.³⁰ Another court focused on the fact that *Pearson* allows courts the “analytical flexibility” to focus on the determinative prong of

2010); *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009); *Collier v. Montgomery*, 569 F.3d 214, 217 & n.3 (5th Cir. 2009).

19. *See, e.g., Raiche v. Pietroski*, 623 F.3d 30, 36 (1st Cir. 2010); *Rohrbough v. Hall*, 586 F.3d 582, 585 (8th Cir. 2009).

20. *Bryan v. MacPherson*, 630 F.3d 805, 817 (9th Cir. 2010).

21. *See, e.g., Morgan v. Swanson*, 610 F.3d 877, 883 n.8 (5th Cir. 2010); *Kennedy v. City of Cincinnati*, 595 F.3d 327, 336 (6th Cir. 2010).

22. *See, e.g., Cmty. House, Inc. v. City of Boise*, 623 F.3d 945, 967 (9th Cir. 2010); *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 526 (1st Cir. 2009).

23. *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1277 (10th Cir. 2009).

24. *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009).

25. *McCullough v. Antolini*, 559 F.3d 1201, 1205 (11th Cir. 2009).

26. *Swanson v. Town of Mountain View*, 577 F.3d 1196, 1199 (10th Cir. 2010); *see also Clark v. Wilson*, 625 F.3d 686, 690 (10th Cir. 2010) (quoting *Swanson*, 577 F.3d at 1199).

27. *See Clark*, 625 F.3d at 689; *Swanson*, 577 F.3d at 1199.

28. *See Clark*, 625 F.3d at 690 (quoting *Swanson*, 577 F.3d at 1199).

29. *See, e.g., Koubriti v. Convertino*, 593 F.3d 459, 471 (6th Cir. 2010); *Nieler v. Bd. of Cnty. Comm’rs*, 582 F.3d 1155, 1166 (10th Cir. 2009); *Krainski v. Nevada ex rel. Bd. of Regents*, 616 F.3d 963, 969 (9th Cir. 2010).

30. *Cortés-Reyes v. Salas-Quintana*, 608 F.3d 41, 51 (1st Cir. 2010).

qualified immunity, which sometimes means an analysis of Prong One is unnecessary.³¹ Courts' appreciation for the flexibility that *Pearson* granted them is evident in the frequent citations to *Pearson*'s "sound discretion" language.³² The D.C. Circuit waxed positive on "the *Pearson* option," finding that *Saucier* made constitutional questions unavoidable, which is no longer the case under *Pearson*.³³ The Fifth Circuit expressed its gratitude for the *Pearson* "short-cut," which relieves courts from "undertaking the often more difficult task of determining" constitutional violations.³⁴ The Seventh Circuit likewise expressed appreciation for its new ability to "sidestep" constitutional questions where appropriate.³⁵

In sum, while a few cases suggest that *Pearson* favors one approach over the other, most circuits have maintained that *Pearson* is neutral. The developing body of circuit case law mostly suggests that Prong One is optional and discretionary, and that courts should neither favor nor disfavor optional prospective rulings.

II. LOWER COURTS' STATISTICAL USE OF VARIOUS OPTIONS UNDER *PEARSON*

A. Methodology

To assess lower courts' use of the new *Pearson* framework, we examined every published circuit court case citing *Pearson* during the calendar years 2009 and 2010. We excluded cases citing *Pearson* for reasons unrelated to qualified immunity. That left 205 cases citing *Pearson* in cases presenting questions of qualified immunity. We then classified those cases into one of the four types of qualified immunity rulings described above.

Although most cases were easily classified into one of the four types, some cases could not be classified for various reasons. For example, some cases involved multiple claims of various violations or multiple defendants, which were not all resolved the same way. In such cases, a court might allow some claims to proceed, but dismiss others under either Prong One or Prong Two. In such "mixed" cases, if a certain type of result predominated, we classified the case as that type; if no particular type predominated, we excluded it from the sample.

Additionally, some courts essentially merged the two prongs, making it difficult or impossible to classify which prong was outcome-determinative. For example, in cases centering on alleged illegal searches and seizures, which turned on the existence of probable cause, some courts stated that the ultimate resolution depended on whether there was "arguable probable cause."³⁶ Technically, the Prong One analysis requires that an officer have

31. *Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1291 (11th Cir. 2009).

32. *See, e.g., Krainski*, 616 F.3d at 968; *Wernecke v. Garcia*, 591 F.3d 386, 392 (5th Cir. 2009).

33. *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009).

34. *Morgan v. Swanson*, 627 F.3d 170, 176 n.8 (5th Cir. 2010).

35. *Whitlock v. Brown*, 596 F.3d 406, 410 (7th Cir. 2010).

36. *See, e.g., Rushing v. Parker*, 599 F.3d 1263, 1268 (11th Cir. 2010).

actual probable cause, while the Prong Two analysis requires only arguable probable cause. In practice, courts occasionally combine the two prongs. The resulting rulings suggested that an officer had actual probable cause with a conclusion of this sort: “[W]e find that [the officer] had, at minimum, arguable probable cause to issue the arrest affidavit of the Plaintiff.”³⁷ A few such cases were also excluded from the sample. After excluding a small percentage of these unclassifiable cases, we were left with a usable universe of 190 cases.

B. Overall Rates of Ruling Types

Of those 190 cases that could be classified, the overall usage of the four possible rulings after *Pearson* was as follows:

Table 1: Post-*Pearson* Rulings by Type³⁸

Type A:	Prong One:	no constitutional violation, and		
	Prong Two:	a fortiori, qualified immunity	→ Defendant wins.	34.7%
Type B:	Prong One:	constitutional violation, but		
	Prong Two:	qualified immunity	→ Defendant wins.	7.9%
Type C:	Prong One:	constitutional violation, and		
	Prong Two:	no qualified immunity	→ Plaintiff wins.	37.9%
Type D:	Prong One:	skipped with no holding, and		
	Prong Two:	qualified immunity	→ Defendant wins.	19.5%

Of course, Type C rulings are substantially irrelevant to the questions addressed in this Essay because *Pearson* did not alter them in any important way. A ruling that a defendant violated clearly established law in Prong Two necessarily involves a ruling that the defendant violated that law in Prong One. Simply put, when a court rules for the plaintiff, it must reach the first prong. Because Type C rulings do not involve any *Pearson*-derived discretion, we can exclude them to focus on the universe of cases that do.

The relevant universe includes Type A, B, and D rulings—i.e., cases where the defendant prevailed. Within that universe, the overall usage of each type broke down as follows:

37. *Id.*

38. See Ted Sampsel-Jones & Jenna Yauch, Measuring *Pearson* Survey Results (unpublished spreadsheet) (on file with the Fordham Law Review).

Table 2: Post-Pearson Results Excluding Type C Rulings³⁹**Type A: 55.9%****Type B: 12.7%****Type D: 31.4%**

Thus, in cases where courts had an option of issuing a ruling on Prong One, they exercised that option in approximately two-thirds of cases. In other words, about 68.6% of such cases (Type A plus Type B) resulted in unnecessary prospective rulings, and about 31.4% skipped directly to Prong Two. On the whole, it appears that courts continued to follow the *Saucier* sequence most of the time, although they exercised their *Pearson* discretion in a substantial minority of cases.

C. Rates by Party Affiliation

We next attempted to discern whether judges' political affiliation had a discernible effect on their use of the various qualified immunity ruling types.⁴⁰ Among circuit panels with a majority of Republican-appointed judges, the overall usage rates were:

Table 3: Post-Pearson Results by Panels with a Majority of Republican-Appointed Judges⁴¹**Type A: 37.1%****Type B: 6.4%****Type C: 36.4%****Type D: 20.0%**

Excluding Type C cases, panels controlled by Republican appointees had the following rates:

Table 4: Post-Pearson Results by Panels with a Majority of Republican-Appointed Judges, Excluding Type C Rulings⁴²**Type A: 58.4%****Type B: 10.1%****Type D: 31.5%**

For panels with a majority of Democrat-appointed judges, the overall rates were:

39. *See id.*

40. Of the 190 cases included in these results, 145 were decided by panels with a majority of Republican appointees and 60 were decided by panels with a majority of Democrat appointees. *See id.*

41. *See id.*

42. *See id.*

Table 5: Post-Pearson Results by Panels with a Majority of Democrat-Appointed Judges⁴³

<i>Type A:</i>	28.0%
<i>Type B:</i>	12.0%
<i>Type C:</i>	42.0%
<i>Type D:</i>	18.0%

Considering only cases involving *Pearson* discretion, panels controlled by Democratic appointees ruled as follows:

Table 6: Post-Pearson Results by Panels with a Majority of Democrat-Appointed Judges, Excluding Type C Rulings⁴⁴

<i>Type A:</i>	48.3%
<i>Type B:</i>	20.7%
<i>Type D:</i>	31.0%

Thus, Republican-appointee-controlled panels issued unnecessary Prong One rulings in 68.5% of cases and Democratic-appointee-controlled panels issued them in 69.0% of cases. That difference does not appear significant. The greatest distinction was that Democratic-appointed judges appeared to be more likely to find that a defendant violated the law (i.e., Type B plus Type C). Democratic-appointee-controlled panels found Prong One violations in 54.0% of cases, while panels controlled by Republican appointees found them in 42.9% of cases. Even that statistical difference, however, is fairly small.

III. STATED RATIONALES AND EXAMPLES OF VARIOUS TYPES

A. *Rationales for Exercising Pearson Discretion*

We next examined lower courts' stated rationales for either issuing or forgoing a Prong One ruling. Overall, their rationales were pragmatic and grounded in the Supreme Court's guidance in *Pearson*. Circuit courts have been particularly willing to issue unnecessary Prong One rulings in situations where there was a paucity of precedent on the constitutional issue presented and the need for such a ruling seemed great.

For example, the Ninth Circuit followed the *Saucier* order in *al-Kidd v. Ashcroft*.⁴⁵ It explained that *Saucier*'s sequence was "especially valuable in addressing constitutional questions" that would not only arise infrequently, but would likely be resolved by qualified immunity precisely due to the lack of pertinent case law.⁴⁶ There, the court considered the constitutionality of former Attorney General John Ashcroft's decision to confine United States citizens pursuant to the Federal Material Witness

43. *See id.*

44. *See id.*

45. 580 F.3d 949 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011).

46. *Id.* at 964.

Statute, without charging them with any crimes.⁴⁷ Although the court eventually decided that Ashcroft was not protected by any kind of immunity, the court decided that it should confront the Prong One issue—regardless of the resolution of Prong Two—to provide guidance to future courts confronted with similar legal issues.⁴⁸

Other circuit panels also have deemed the *Saucier* order appropriate in other cases of first impression. For example, a different Ninth Circuit panel used the *Saucier* framework because it had not previously addressed whether police could rely on the statement of a very young victim as the sole fact supporting their seizure of a suspected child molester.⁴⁹ Another panel found it beneficial to follow the *Saucier* sequence to address, for the first time, the constitutional standards governing an in-school seizure of a student allegedly abused by her father.⁵⁰

The Second Circuit has similarly employed the *Saucier* order to advance the development of the law. In *Kelsey v. County of Schoharie*,⁵¹ the court chose to answer the threshold inquiry about the constitutionality of clothing exchange procedures in jails, even though it was not required to do so.⁵² Although many district courts in the circuit had spoken on the issue, the Court of Appeals had not, and it decided to confront the issue because development of constitutional precedent was important.⁵³ The court was aware that the issue may never be settled if it were to continually hold that the law was not clearly established and grant defendants immunity on that ground.⁵⁴

Considering Prong One did not burden the *Kelsey* court because the discussion of one prong necessarily overlapped with the other.⁵⁵ The court noted that there was no reason to abstain from performing the Prong One analysis since analyzing the reasons why the law was not clearly established also demonstrated why no violation was alleged.⁵⁶ Other courts also have determined that the *Saucier* order actually saved them time—a rejoinder to those who say discarding the two-part test is a huge boon for judicial resources. The Seventh Circuit reported that the *Saucier* order “facilitates . . . expeditious disposition” in certain cases.⁵⁷

Courts skipping Prong One have likewise justified their decision to do so with the pragmatic reasons that *Pearson* endorsed. They quite frequently explained this choice in terms straight out of *Pearson*, and collectively they have used nearly every rationale the Supreme Court relied on in overturning

47. *Id.*

48. *Id.*

49. *Stoot v. City of Everett*, 582 F.3d 910, 918 n.8 (9th Cir. 2009).

50. *Greene v. Camreta*, 588 F.3d 1011, 1021 (9th Cir. 2009), *vacated in part by* 131 S. Ct. 2020 (2011).

51. 567 F.3d 54 (2d Cir. 2009).

52. *Id.* at 61.

53. *Id.*

54. *Id.* at 61–62.

55. *Id.*

56. *Id.*

57. *Akande v. Grounds*, 555 F.3d 586, 590 n.3 (7th Cir. 2009).

the mandatory nature of *Saucier*. Some circuit panels explained that, given the freedom to address either prong first, they simply focused on the determinative one.⁵⁸ The Eleventh Circuit expressed a belief that analyzing Prong Two only was the “‘best [way to] facilitate the fair and efficient disposition’ of [the] case.”⁵⁹ These explanations both fall in line with *Pearson*’s remonstrance to save time and money for the parties and courts where possible.⁶⁰ The First Circuit avoided Prong One in *Cortés-Reyes v. Salas-Quintana*⁶¹ because it would have been called upon to draw uncertain conclusions about Puerto Rican law.⁶² The court based its refusal on *Pearson*’s admonishment that the goal of developing the law is not advanced when a federal court must make assumptions about state law to resolve constitutional issues.⁶³ The Seventh Circuit found that a Prong One analysis would serve no jurisprudential purpose because the analysis in that case would be complicated by its “quirky facts” and, as such, would provide little guidance for future cases.⁶⁴ Lower courts have also drawn on *Pearson*’s constitutional avoidance rationale.⁶⁵ The Sixth Circuit relied on *Pearson*’s discussion of challenging procedural postures in *Koubriti v. Convertino*.⁶⁶ *Pearson* had noted that “the precise factual basis for the plaintiff’s claim . . . may be hard to identify” at the time an appellate court rules on qualified immunity.⁶⁷ In *Koubriti*, the Sixth Circuit declined to address the Prong One question because it had “not been developed in the lower court record.”⁶⁸

Some circuit courts have been willing to admit that, given the freedom to do so, they simply “bypass the more difficult question,” which is often whether a constitutional right was violated in Prong One.⁶⁹ Despite the value of developing the law, there are many situations where courts simply avoid creating new law. This was the case for the Eleventh Circuit when it confronted the extent of one’s reasonable expectation of privacy in email content.⁷⁰ The court noted there were few circuit decisions regarding Fourth Amendment protection of email content and that the Supreme Court had not spoken on privacy expectations in electronic communications.⁷¹

58. See, e.g., *Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1291–92 (11th Cir. 2009).

59. *Corey Airport Servs., Inc. v. Decosta*, 587 F.3d 1280, 1286 (11th Cir. 2009) (quoting *Pearson v. Callahan*, 555 U.S. 223, 242 (2009)).

60. See *Pearson*, 555 U.S. at 237.

61. 608 F.3d 41 (1st Cir. 2010).

62. See *id.* at 51–52.

63. See *id.* at 51 (quoting *Pearson*, 555 U.S. at 238).

64. *Chaklos v. Stevens*, 560 F.3d 705, 711 (7th Cir. 2009).

65. See, e.g., *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009) (“We thus follow the ‘older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.’” (internal quotation marks omitted) (quoting *Pearson*, 555 U.S. at 241)).

66. 593 F.3d 459, 471 (6th Cir. 2010).

67. *Pearson*, 555 U.S. at 238–39.

68. *Koubriti*, 593 F.3d at 471.

69. *Phillips v. Hust*, 588 F.3d 652, 657 (9th Cir. 2009).

70. See *Rehberg v. Paulk*, 611 F.3d 828, 846 (11th Cir. 2010).

71. See *id.* at 843–44.

The court concluded that the prudent choice was to decline to set precedent, particularly because it would not be essential to the outcome of the case.⁷² The Tenth Circuit perhaps summed it up best:

To attempt to answer *Saucier*'s first question would require us to opine on an open and significant issue of constitutional law on an inadequate record, without benefit either of a district court holding or of relevant briefing, even though the issue would have no effect on the outcome of the case. We therefore exercise our newfound discretion and move on.⁷³

B. Example: Type B

Type B holdings are the least frequent of the four post-*Pearson* types.⁷⁴ It is relatively rare for courts to find that a defendant violated the law but also that the defendant is entitled to immunity. At least occasionally, however, circuit courts take that path, which is where the “prospective-only” aspect of *Saucier* is most obvious. Type B rulings essentially hold that this particular defendant escapes without liability, but all future defendants who engage in similar conduct will be liable.⁷⁵ Some courts explicitly choose this prospective option.

Stoot v. City of Everett was one such case.⁷⁶ The mother of a four-year-old girl, A.B., reported to the police that her daughter had been sexually abused by a fourteen-year-old boy, Paul Stoot.⁷⁷ An officer, Jensen, responded to the call and interviewed A.B. about the alleged abuse.⁷⁸ Jensen determined that A.B.'s story was credible and, without further investigation or corroboration, headed to Stoot's school to seize and interrogate him.⁷⁹ Stoot later alleged that the interrogation at the school was coercive—that Jensen threatened him, offered incentives for Stoot to confess, and engaged in “blaming the victim” strategies designed to elicit inculpatory statements.⁸⁰ Stoot eventually gave in and confessed to several acts of sexual abuse against A.B. Jensen had Stoot write and sign a confession.⁸¹

The district court eventually dismissed all charges against Stoot, finding both that the confession was coerced and that A.B. was not credible.⁸² Stoot's family then filed a § 1983 suit, claiming several constitutional violations, including that Jensen seized Stoot without probable cause in violation of the Fourth Amendment.⁸³ On appeal, the Ninth Circuit held that the law was not clearly established such that Jensen was on notice that

72. *See id.* at 846.

73. *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1278 (10th Cir. 2009).

74. *See supra* tbl.1.

75. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

76. 582 F.3d 910 (9th Cir. 2009).

77. *Id.* at 913.

78. *Id.*

79. *Id.* at 914–15.

80. *Id.* at 915–17.

81. *Id.* at 915.

82. *Id.* at 916–17.

83. *Id.* at 917.

his actions were unlawful, entitling him to qualified immunity.⁸⁴ Along the way to this holding, however, the court took a purposeful path to clarify the law. Because the court had not previously ruled on whether a statement of a very young victim of alleged sexual abuse could establish probable cause on its own, the court chose to address the issue under Prong One.⁸⁵

To resolve this issue of first impression, the court first relied on precedent holding that crime victims' statements cannot alone support a finding of probable cause if the victims are not reasonably trustworthy or reliable.⁸⁶ Applying this rule to the new fact scenario—a very young victim of alleged sexual abuse—the court found three factors weighed against the trustworthiness of A.B.'s statement.⁸⁷ First, A.B. was only four years old and the abuse was alleged to have taken place over a year before it was reported.⁸⁸ Second, A.B. changed her answers several times throughout the interview with Jensen.⁸⁹ Third and finally, A.B. confused Stoot with another boy during Jensen's interview.⁹⁰ Taken together, these three factors swayed the court's determination that A.B.'s testimony was not trustworthy enough to establish probable cause on its own.⁹¹ Thus Jensen seized Stoot without probable cause and in violation of the Fourth Amendment.⁹²

Although the court did not set a bright-line rule against the reliability of child victim statements, the analysis provides guidance for future courts faced with probable cause determinations based on child victim statements. The court also used the *Stoot* case as an opportunity to distinguish Tenth Circuit precedent on the same issue. Jensen had relied on *Easton v. City of Boulder*⁹³ to support his claim that internally conflicting statements of child victims can establish probable cause.⁹⁴ *Easton* similarly involved an allegation of child sexual abuse where the suspect's seizure was based, in part, on the victim's statements.⁹⁵ When Easton brought suit challenging the reliability of the statement used by police, the Tenth Circuit held that reliance on the victim's statements was reasonable despite internal inconsistencies.⁹⁶ Moreover, the *Easton* Court repudiated a per se rule that statements of very young child victims cannot be relied upon in probable cause determinations.⁹⁷ Jensen attempted to cite *Easton* for the proposition that police may reasonably rely solely on a child victim's partially

84. *Id.* at 922.

85. *Id.* at 918 n.8.

86. *Id.* at 919.

87. *Id.*

88. *Id.*

89. *Id.* at 920.

90. *Id.*

91. *Id.*

92. *Id.* at 921.

93. 776 F.2d 1441 (10th Cir. 1985).

94. *Stoot*, 582 F.3d at 920.

95. *Easton*, 776 F.2d at 1443–46.

96. *Id.* at 1449.

97. *Id.*

conflicting statements.⁹⁸ The *Stoot* court recognized that *Easton* did so hold, but decided the Tenth Circuit case was distinguishable on the basis of corroboration.⁹⁹ In *Easton*, the police had corroborating evidence in the form of another child's statement, physical evidence, and information about Easton himself.¹⁰⁰ Therefore, the Ninth Circuit found that *Easton* was of no avail to Jensen, who sought a holding that uncorroborated child victim statements alone sufficed for probable cause.¹⁰¹ *Easton* did not go that far, according to the Ninth Circuit.

By taking the time to explicate Prong One in *Stoot*, the Ninth Circuit demonstrated exactly what *Saucier* promoted—and what *Pearson* potentially lost. The court found Jensen was immune to the Fourth Amendment challenge because the *Stoots* could cite no case law putting him on notice that his actions were unlawful.¹⁰² The Ninth Circuit could have rested the entire decision there. Instead, by creating new law, the court essentially put every other officer in the circuit on notice that relying only on uncorroborated and unreliable statements of very young sexual abuse victims to establish probable cause is a constitutional violation, and qualified immunity would no longer protect them if they did that. Perhaps the decision to analyze Prong One in *Stoot* was political, because the circuit panel was controlled by Democrat appointees and our survey demonstrated a slight Democratic-appointee preference for finding that officers committed constitutional violations.¹⁰³ Perhaps the panel sought to restrain the actions of police officers by delineating a new constitutional rule. Regardless, it is clear that the court made a purposeful choice to clarify the law.

C. Example: Type D

Of the cases we studied, just over one-third resulted in a Type D ruling. These courts chose to exercise the freedom *Pearson* gave them and avoid the Prong One analysis entirely. *Christensen v. Park City Municipal Corp.*¹⁰⁴ is a representative example of a Type D case. Shaun Christensen was a visual artist who attempted to display and sell his artwork on public property in Park City, Utah.¹⁰⁵ Christensen was arrested for violating a city ordinance requiring a license to conduct business outdoors.¹⁰⁶ After the charges against Christensen were eventually dropped, he filed a civil suit

98. *Stoot*, 582 F.3d at 921.

99. *Id.*

100. *Easton*, 776 F.2d at 1443–44.

101. *Stoot*, 582 F.3d at 921.

102. *Id.* at 922.

103. Compare *supra* tbl.5 (showing that Democrat-appointee-dominated panels found constitutional violations in 54.2% of cases—both Type B and C rulings), with *supra* tbl.3 (demonstrating that Republican-appointee-dominated panels found such violations in only 43.6% of cases).

104. 554 F.3d 1271 (10th Cir. 2009).

105. *Id.* at 1273–74.

106. *Id.* at 1274.

against the city and the arresting officers claiming a violation of his First Amendment right to display and sell artwork.¹⁰⁷

The district court dismissed Christensen's claims against the individual officers.¹⁰⁸ First, the court found that Christensen's complaint failed to state a claim because he did not specify the type of artwork at issue.¹⁰⁹ Then, the court denied Christensen leave to amend his complaint because the law governing the officers' conduct was not clearly established at the time of the arrest.¹¹⁰ Therefore, qualified immunity would protect the officers from liability even if Christensen remedied the specificity problem.¹¹¹ The district court held that it "need not determine the exact parameters of the First Amendment protection for the sale of expressive artwork because of the [complaint's] vagueness" and the inevitability of qualified immunity.¹¹² On appeal, the Tenth Circuit reversed the ruling that Christensen's complaint did not adequately allege the nature of his artwork.¹¹³ Like the district court, however, the circuit court refused to address the possibility of a First Amendment violation because it "would have been very difficult to do that here."¹¹⁴

The difficulties were both legal and practical. Legally, it was unclear which framework applied to Christensen's First Amendment claim.¹¹⁵ The district court analyzed the violation under the standard set forth in *Bery v. City of New York*.¹¹⁶ Under *Bery*, artwork that falls within the same categories as paintings, photographs, prints, or sculptures receives First Amendment protection as presumptively expressive artwork.¹¹⁷ Because the district court and all the parties had assumed that *Bery* applied,¹¹⁸ the court dismissed Christensen's First Amendment claim because it could not discern from the complaint whether his artwork fell into one of the *Bery* categories.¹¹⁹ The Tenth Circuit was not convinced that *Bery* was the proper standard, however.¹²⁰ It suggested that the Park City ordinance's prohibitions against selling expressive artwork may be better analyzed "as restrictions on expressive conduct [under *United States v. O'Brien*¹²¹] rather than speech."¹²² The court even noted that some constitutional analysis other than *Bery* and *O'Brien* may apply.¹²³ Because the parties

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* (quoting Order at 6, *Christensen v. Park City Mun. Corp.*, No. 2:06-CV-202 (D. Utah Sept. 15, 2006)).

113. *Id.* at 1276.

114. *Id.*

115. *See id.* at 1276–77.

116. 97 F.3d 689 (2d Cir. 1996); *see Christensen*, 554 F.3d at 1276.

117. *Bery*, 97 F.3d at 696; *see Christensen*, 554 F.3d at 1275.

118. *Christensen*, 554 F.3d at 1276.

119. *Id.* at 1274.

120. *Id.* at 1276–77.

121. 391 U.S. 367 (1968).

122. *Christensen*, 554 F.3d at 1277.

123. *Id.*

assumed *Bery* applied, they had not briefed the issue and thus the court could not easily determine the proper standard.¹²⁴

Practically, this legally complicated issue was exacerbated by logistical problems with Christensen's case. Because the parties had not submitted briefs on the other legal standards, the court could not determine how they would apply.¹²⁵ For example, the *O'Brien* standard, unlike *Bery*, considered the governmental purposes served by the regulation and the alternative channels of communication available to Christensen. The parties' focus on *Bery* meant that the court would be faced with an inadequate record on which to examine those two factors if it had determined that *O'Brien* was the correct framework for analyzing the ordinance.¹²⁶ The Tenth Circuit thought it was fortunate that *Pearson* had recently obviated the need to analyze Prong One.¹²⁷ The court indicated that Christensen's case served as an example of when *Pearson* discretion should be exercised.¹²⁸ The court found that "[i]t would serve no practical purpose for us to delve any deeper into the First Amendment principles applicable to this case. . . . [F]urther analysis of the merits would have no actual consequence for the litigants."¹²⁹ Instead, the court chose to analyze Prong Two alone because it was determinative and relieved the court of the need to opine on a "significant issue" of constitutional law without the benefit of briefing or a fully formed record.¹³⁰ Perhaps the *Christensen* court's choice to avoid Prong One could be explained by the judges' political affiliations—the panel was comprised entirely of Republican appointees¹³¹ and our research revealed that those judges demonstrated a slight preference for avoiding unnecessary Prong One rulings.¹³² Nevertheless, the court may have been on target in asserting that the *Christensen* case was precisely the sort of situation the *Pearson* Court sought to avoid—forcing courts to rule on important constitutional issues in challenging procedural postures when the result would be non-dispositive.

IV. COMPARISON WITH CASES DECIDED UNDER *SAUCIER*

A. *Statistical Use of Various Options Under Saucier and Pearson*

Relying on previous work by other scholars, we can compare courts' use of the various ruling types under the *Saucier* framework with their use under the *Pearson* framework. As we discussed above, *Saucier* permitted courts to issue only Type A, B, and C rulings, but *Pearson* enabled them to issue Type D rulings.

124. *Id.* at 1276–77.

125. *Id.*

126. *Id.* at 1277.

127. *Id.*

128. *Id.* at 1278.

129. *Id.* at 1277.

130. *Id.* at 1278.

131. *See id.* at 1273 (noting that panel consisted of Circuit Judges Terrence O'Brien, Wade Brorby, and Michael W. McConnell).

132. Compare *supra* tbl.3, with *supra* tbl.5.

Several scholars have previously conducted statistical analyses of the courts' rulings under the *Saucier* framework. These scholars' methodologies varied somewhat, as did their results, but overall they reached roughly consistent conclusions. Paul Hughes examined 158 published appellate cases decided in 2005 under the *Saucier* framework,¹³³ Nancy Leong analyzed 155 such cases decided in 2006 and 2007,¹³⁴ and Greg Sobolski and Matt Steinberg analyzed 355 such cases decided between 2001 and 2008.¹³⁵ Their results are summarized and averaged in the following table:

Table 7: Summary of Previous Studies' Results

	<i>Hughes</i> ¹³⁶	<i>Leong</i> ¹³⁷	<i>Sobolski & Steinberg</i> ¹³⁸	<i>Average</i> ¹³⁹
Type A:	42.2%	61.9%	43.6%	47.5%
Type B:	10.2%	6.5%	13.9%	11.3%
Type C:	46.4%	26.5%	36.5%	36.5%
Type D:	1.2%	4.5%	5.9%	4.5%

Two aspects of their collective findings bear particular emphasis. First, even though *Saucier* purported to mandate consideration of Prong One—and thus Type D rulings were not allowed—lower courts still occasionally issued Type D rulings before *Pearson*. In other words, in a small but non-trivial number of cases, lower courts ignored *Saucier* and refused to issue Prong One rulings.¹⁴⁰ Second, despite *Saucier*'s focus on enabling Type B rulings—with their purely prospective adjudications of constitutional rights—lower courts employed that option relatively rarely. All three empirical analyses of *Saucier*-era cases found that the great majority of cases—around 80%—were either Type A or Type C.

Using averages of previous studies, we can compare *Saucier*-era results to our *Pearson*-era results:

133. Paul W. Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 422–23 (2009).

134. Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 711 (2009).

135. Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Pearson v. Callahan*, 62 STAN. L. REV. 523, 545 (2010).

136. Hughes, *supra* note 133, at 423 tbl.1.

137. Leong, *supra* note 134, at 711 tbl.4.

138. Sobolski & Steinberg, *supra* note 135, at 545–46 tbls.1 & 2.

139. These averages are intended to serve as rough estimates for the purposes of comparing these authors' findings with our own. They have been weighted according to the number of cases each study surveyed, but they do not account for the authors' varying methodologies or any overlap in the cases examined.

140. *Saucier*'s mandate, of course, applied equally to district courts and circuit courts. See *Saucier v. Katz*, 533 U.S. 194, 207 (2001) (indicating that the order was an "instruction to the district courts and courts of appeals"); see also *Brosseau v. Haugen*, 543 U.S. 194, 195, 198 & n.3 (2004) (per curiam) (noting that the court of appeals followed the *Saucier* sequence and that the Court was not "reconsider[ing] [its] instruction in *Saucier*" in that case).

Table 8: Comparison of *Saucier*-era and *Pearson*-era Results

	<i>Saucier</i> ¹⁴¹	<i>Pearson</i> ¹⁴²	<i>Change</i>
<i>Type A:</i>	47.5%	34.7%	-12.8%
<i>Type B:</i>	11.3%	7.9%	-3.4%
<i>Type C:</i>	36.5%	37.9%	+1.4%
<i>Type D:</i>	4.5%	19.5%	+15.0%

The percentage of Type B and C rulings changed only to a small extent, while the percentage of Type A and D rulings changed substantially. These results suggest that lower courts under *Pearson* have not only employed Type D rulings much more frequently, but more importantly, they suggest Type D rulings occurred in cases where the courts otherwise would have issued a Type A ruling. In other words, under *Saucier*, there were more cases in which courts issued a Prong One ruling stating that the defendants had not violated the law, which created harmful precedent for future plaintiffs and helpful precedent for future defendants. Under *Pearson*, there were more cases where courts avoided setting any precedent for future cases. Because these latter Type D rulings appear to have come largely at the expense of Type A rulings, *Pearson* has had the counterintuitive effect of helping plaintiffs and hurting defendants.

Moreover, these conclusions are generally consistent with those reached earlier by Nancy Leong. After comparing cases decided under *Saucier* with cases decided before *Saucier*, Leong found that *Saucier* produced “virtually no change in the percentage of cases where courts held that a constitutional violation had taken place and a striking increase in the percentage of cases where courts held that no constitutional violation had taken place.”¹⁴³ She concluded that “the constitutional questions avoided pre-*Saucier* are now almost uniformly decided in defendants’ favor.”¹⁴⁴ In other words, she found that *Saucier* caused lower courts to substitute Type A rulings for Type D rulings. Our study confirms her findings on *Saucier*’s effect. The Supreme Court’s repudiation of the mandatory sequence in *Pearson* has allowed lower courts to revert to their pre-*Saucier* practice: substituting Type D rulings for Type A rulings. Leong’s and our conclusions, however, are not fully consistent with those of Greg Sobolski and Matt Steinberg. Although they found that “the transition from pre- to post-*Saucier* corresponds to an observable increase in frequency of rights-restricting holdings in which a court holds the plaintiff has not successfully alleged a constitutional violation [i.e., Type A rulings],” they concluded that “such changes [were] not statistically significant.”¹⁴⁵

Ultimately, it may be too early to tell what the effect of *Pearson* will be. What seems clear, however, is that the shift from *Saucier* to *Pearson* was

141. See *supra* tbl.7.

142. See Sampsell-Jones & Yauch, *supra* note 38.

143. Leong, *supra* note 134, at 690.

144. *Id.* at 693.

145. Sobolski & Steinberg, *supra* note 135, at 547.

not an unambiguous victory for government official defendants. *Pearson* may have had little effect, or indeed it may have benefited citizen plaintiffs. Regardless of *Pearson*'s ultimate effect, it should not be taken as evidence that we have a Supreme Court bent on limiting the constitutional rights of American citizens.

CONCLUSION

As a political matter, *Pearson* has been alternately hailed and criticized as a victory for government official defendants over citizen plaintiffs. Academic commentators have generally assumed that, in the long-run, *Pearson* will result in substantially less tort liability for official lawbreakers because courts will decline to address Prong One issues, and thus officials will remain indefinitely immune because the law will never be clearly established.

In reality, such assumptions may be substantially unfounded, and some of the criticisms overblown. In most cases, courts continue to follow the ordered *Saucier* framework even where they are not required to do so.¹⁴⁶ In cases where courts exercised their *Pearson* discretion and skipped the Prong One merits analysis, they often do so because the case presents quirky facts or odd questions of law with limited precedential value.¹⁴⁷ Moreover, the data suggest that Democratic-appointed judges are both somewhat more likely to rule in plaintiffs' favor and to issue optional Prong One rulings.¹⁴⁸ In its application, therefore, the optional *Pearson* framework has demonstrated a small amount of self-selection bias favoring citizen plaintiffs.

Conversely, *Pearson* has proven not to be a great victory for *Saucier*'s critics. Those critics had argued that *Saucier* required courts to write dicta and issue unconstitutional advisory opinions.¹⁴⁹ Under *Pearson*, however, courts generally do the same thing. Courts still regularly issue Type A and B rulings,¹⁵⁰ both of which involve constitutional rulings that are technically unnecessary and therefore dicta—at least under certain (arguably naive and untenable) definitions of dicta. While *Pearson* has been cited as a general endorsement of the constitutional avoidance canon, the fact remains that most lower courts violate that canon regularly under *Pearson*. *Pearson* has not stopped courts from issuing the very type of prospective rulings that led critics to attack *Saucier*.

In sum, our analysis of the post-*Pearson* qualified immunity decisions in the circuit courts suggests that not much has changed. *Pearson* reads like a

146. See *supra* tbls.1 & 2.

147. See *supra* notes 58–73 and accompanying text.

148. Compare *supra* tbls.5 & 6, with *supra* tbls. 3 & 4.

149. See, e.g., Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 851–53, 876–881 (2005); Leval, *supra* note 12, at 1277; see also Melissa Armstrong, Note, *Rule Pragmatism: Theory and Application to Qualified Immunity Analysis*, 38 COLUM. J.L. & SOC. PROBS. 107, 123–28 (2004) (assessing analytic and functional arguments for considering such unnecessary rulings dicta).

150. See *supra* tbl.1.

fairly limited qualification of the *Saucier* framework, and for the most part, lower courts have applied it in that spirit.¹⁵¹ *Pearson* suggests that in certain cases, courts should forgo rulings on the merits, but *Pearson* also continues to endorse the use of optional rulings on the merits in order to clarify the law for future cases.¹⁵² *Pearson* allows lower courts to continue issuing prospective rulings in cases where it makes sense to do so.¹⁵³ That is precisely what lower courts have done.¹⁵⁴

151. See *supra* notes 29–35 and accompanying text.

152. See *supra* notes 14–16 and accompanying text.

153. See *supra* notes 14–15 and accompanying text.

154. See *supra* notes 45–57 and accompanying text; see also tbl.1.